the contrary, it appears to me that the whole tenour of the judicial opinion to which we are able to appeal is precisely in accordance with the judgment of the Lord Ordinary, and that his judgment is also justified by what appears to be the constant and invariable practice. The proceedings in *Stevenson* v. *Chisholm*, and particularly the Lord Ordinary's concluding interlocutor, go far to support the view which Lord M'Laren has given effect to, and his opinion, I think, gains further support from the later case of *Douglas* v. *Graham and Wallace*. On the other hand, there is not the slightest appearance of the doctrine that the debtor may be imprisoned on the original warrant after his cautioner has produced him in Court. There is not the least trace of such a proceeding in any of the cases, and we have, besides, the authority of the books of practice, which lay it down as the established rule that once the cautioner has produced the debtor in Court the proper course, when it is desired to have him reimprisoned, is to obtain a fresh warrant. That seems to be a salutary practice, and I am not for disturbing it.

Lord Mure—I think when a course of practice has been in existence for a number of years, and has become established, and when it has substantially the authority of the older cases, that that practice ought to be adhered to, unless it is in clear violation of some well-defined legal principle. There is no such legal principle here, while, as we see from Sheriff Barclay and Mr M'Glashan's books, the practice of requiring a new warrant has been established for many years. In these circumstances I think the imprisonment in the present case on the old warrant was an illegal act.

Lord Shand—I think that the case of *Douglas* recognises the practice as an existing practice, because there the Lord Ordinary (Lord Ivory) having asked the Court whether it was necessary to repeat the inquiry as to the debtor being *in meditatione fugæ*, or whether the new warrant might be issued without any fresh inquiry, the Court replied that no new inquiry was necessary; but if the reclaimer here is right, the Court would have replied that no new warrant at all was necessary. On the whole matter I am of the same opinion as your Lordships.

Lord Deas was absent.

The Court adhered.

Counsel for Reclaimer (Bremner) — Novay. Agent—R. Broatch, L.A.

Counsel for Respondent (Clark) — Trayner. Agent—David Hunter, S.S.C.

Wednesday, December 21.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MUNRO (BORLAND & CO.'S TRUSTEE) *v.* PATERSON.

Reparation—Damages—Where Disponer of Feuing Subjects held Justified in Resuming Possession thereof brevi manu.

A feued ground for building purposes to B, with entry at Whitsunday 1880, and on condition that B should erect and finish certain prescribed tenements thereon by Whitsunday 1881. A agreed to advance sums of money to B by instalments to enable him to erect the tenements; and it was stipulated that for the security of any advances made he should hold the subjects and tenements thereon erected, with power to sell them, and with power to finish any tenements left unfinished previous to selling the same. The work went on, and instalments were paid, until A, having received a report by the architect that the work was very bad, intimated to B, first, that he must remedy the defective work, and then, since B had abandoned the work, that if he did not proceed with the work within a week A would resume possession of the subjects and complete the building. Thereupon, B having neither remedied the defects nor resumed work, A entered into possession of the subjects and proceeded to finish the work. In an action for damages against him at the instance of B's trustee in bankruptcy—*held* that A's conduct was justified in the circumstances, and A assoilzied accordingly.

On 12th June 1880 a minute of agreement was entered into between Thomas Lucas Paterson of Dowanhill on the one part, and George Coupar, Robert Borland, and Adam Borland, the partners of the firm of Adam Borland & Co., on the other part, by which the first party agreed to feu, and the second party to take from him in feu, a plot of ground in Victoria Street, Govan, on the following among other conditions:—"*First*—The term of the second parties' entry shall be the term of Whitsunday 1880. . . . . *Third*—The second parties shall before the term of Whitsunday 1881 erect and finish on said plot of ground tenements of dwelling-houses, or of shops and dwelling-houses, of four square storeys in height, with suitable offices, and the houses shall consist of not less than two apartments each, but the second parties shall have liberty to have one house of one apartment in each flat. . . . . *Seventh*—In case the first party shall make advances to enable the second parties to erect and finish said tenements, or of their being indebted to him in any sums, he shall be entitled to hold the said ground and whole erections made or to be made thereon as a catholic security for repayment of the debt due to him at the time, including interest and expenses, and to let the subjects and uplift the rents thereof; and he shall also have full power to sell and dispose of the said tenement or tenements and ground by public roup or private bargain, and to dispone the subjects to the purchasers absolutely and

irredeemably under the burden of the original feu-duty and others effeiring thereto, and to apply the prices or rents thereof in repayment of the debt due to him, whether under bills or otherwise, and interest thereon, and whole expenses which may be incurred by him in the premises. *Eighth* — The first party shall also have full power, if he thinks proper, to complete and finish any of said tenements left unfinished at the sight of any architect in Glasgow whom he may appoint previous to selling and disposing of the same, and a certificate under the hands of said architect of the sums which may be expended by the first party in completing and finishing said tenements, including said architect's remuneration, shall be sufficient evidence of the sums of money that may be so expended. *Ninth* —In case the first party shall make advances as aforesaid to the second parties, the same and all interest due thereon, and expenses incurred by him, shall be repaid to him by the term of Martinmas 1880, failing which he shall at any time thereafter be entitled to exercise the whole powers conferred on him by these presents." . . . .

About 1st May 1880 Messrs Borland & Co. began operations for the erection of three tenements of dwelling-houses on the plot of land so feued to them. Instalments, amounting in all to nearly £1500, were paid by Mr Paterson, acting under reports by Mr Thomson, civil engineer and architect to the pursuers in terms of the agreement, Mr Thomson's report as to the first instalment being dated 15th June 1880, and that as to the second and third instalments being dated 8th July 1880. On 6th September, however, Mr Thomson reported in these terms: —"At the request of Messrs Borland & Co. I have made an inspection of their new buildings in Govan, but the work is so bad that I cannot report further for payment."

On 8th September Mr Paterson wrote to Borland & Co. as follows:—"Dear Sirs,—I have just received a note from Mr Thomson, archt., stating that he 'has inspected your buildings, but the work is so bad he cannot report further for payment.' I have also recd. information from another party that the statement you made as to the external walls of the tenements in the neighbourhood of yours not being strapped and lathed is quite incorrect. This confirms the objection I made to your not having lathed your buildings when I asked if you had done so last Friday. I feel greatly annoyed at the way you have conducted matters throughout, and seeing Mr Thomson refuses to grant you certificate for further advances, I am at a loss to see what is to be done. I have acted liberally with you hitherto in the hope that you would carry out my urgent recommendation—as you promised you would—that you would build good and substantial property, and am greatly disappointed that you have not done so. I purpose being at my office on Thursday, and wish you to come and meet me that day at one o'clock in order that some understanding may be come to as to what is to be done.—Yours," &c.

Various correspondence ensued, in course of which the defender intimated that the pursuers must remedy their deficient work, and if they failed to do so it would be necessary for him to take the work into his own hands and complete the houses himself. He further wrote on 27th September 1880:—"I wish further to repeat the recommendation which I made to you this morning, to call your creditors together and afford me an opportunity of informing them how matters stand between you and me, and of my willingness to make over the property to them upon being paid for my outlays on your account. I am prepared to do this as soon as I have remedied the existing defects, and leave them thereafter to carry out the finishing; and failing their agreeing to this, it will fall upon me to finish the property wholly, after which I shall sell it, and if there is any surplus arising out of it beyond my outlays, such surplus can be paid over to your creditors. I am extremely sorry that matters should have come to this crisis, but it is wholly owing to your own mismanagement and unwise conduct.—Yours," &c.

On 26th October Mr Stewart, Mr Paterson's law-agent, wrote to Mr Kennedy, agent for Borland & Co., as follows:—"Dear Sir,—I have your note of this morning, and beg to hand you, as requested, copy of the agreement between Mr Paterson and Messrs Adam Borland & Coy. I also hand you a letter which I wrote Mr George Couper on the 20th, which was returned marked 'Gone, no address.' I may repeat here what I said to the meeting yesterday, that Mr Paterson is ready to make any reasonable arrangement for the tenements being finished, and that he has no desire to take the finishing into his own hands, or to put the creditors to disadvantage in any way whatever. His interest lies in the buildings being finished in a tradesmanlike and proper manner, and either sold or a loan obtained in order to his advances being repaid; but of course he must protect his own interests, and no one, I should think, can blame him for doing so. I hope that the creditors may see their way to take up the matter, and I shall be glad to hear from you at your earliest convenience what they have to propose. It is desirable that delay should be avoided.—Yours," &c. And on 1st November Mr Stewart wrote to Mr Kennedy as follows:—"Dear Sir,—I beg to intimate to you, as acting for Messrs Adam Borland & Coy. and their creditors, that Mr T. L. Paterson will forthwith, in consequence of their leaving the tenements at Govan unfinished, and in terms of the agreement, proceed to finish the same, and sell and dispose thereof when finished, and apply the price or prices obtained therefor in repayment of his advances made and to be made, interest thereof, and all costs, charges, and expenses incurred and to be incurred in the premises, and he will account for the surplus, if any, to the person or persons having right thereto. I shall feel obliged by your acknowledging receipt of this intimation.—I am," &c.

On 14th September Mr Kennedy had procured a report from Mr Taylor, architect, with a view to raising a loan on the property in question. Mr Taylor's report was in these terms:—"Dear Sir,—As instructed, I have examined three tenements forming Numbers 27-35 Queen Street, Govan, presently in course of erection by Messrs Adam Borland & Co., and have to report—These buildings are four storeys high, each tenement having a frontage of 32 feet to Queen Street, by a depth of 38 feet 6 in., and are to be occupied as dwelling-houses of one and two apartments, with w.c.s, entering off half stair landings. They are at present being plastered, and so far as they have gone are substantially built, and are stand-

ing well—the front walls are of polished ashlar, back walls rubble, and brick gables. I estimate the rental at about £92, 10s. for each tenement, or £277, 10s. in all, subject to feu-duty of £52, 17s. 6d., and think the value of the subjects when completed for occupation will be two thousand nine hundred and twenty-five pounds sterling (£2925), after allowing for the above feu-duty, and will form a good security for a loan of two-thirds of that amount.—I am," &c.

Mr Paterson on 18th October paid off Messrs Borland's workmen, and took the work into his own hands. On 22d November 1880 the estates of Borland & Co., and of the individual partners, were sequestrated, and Mr William Munro, accountant, appointed trustee thereon. Mr Munro subsequently raised this action against Mr Paterson, concluding for £1225 in name of damages and *solatium*.

The pursuer averred—"The buildings, it was estimated, would not have cost Messrs Borland & Co. more than £2200, and would have, on Mr Taylor's valuation, yielded them a profit of £725, of all which the defender has deprived them. In consequence of the defender's illegal and unwarrantable actings, certain of the parties from whom Messrs Borland & Co. bought materials did diligence against them and put them in prison, with the view of cutting down the defender's attempted preference, and Messrs Borland & Co. were forced to take out sequestration. At this date Messrs Borland & Co. were perfectly solvent. Their debts were contracted solely in connection with the erection of the foresaid tenements. These, as explained, were the only assets of the firm, but, as valued by Mr Taylor, amply sufficient to leave a large surplus of profit after payment of all debts. The defender knew or might have known that his appropriation of their whole property would be followed by their sequestration. The defender has by his illegal actings, in breach of his contract, ruined Messrs Borland & Co. Their business has been entirely broken up, and each of the partners, Adam Borland, Robert Borland, and George Coupar, has sustained a deep injury in his character, commercial credit, and feelings through the said illegal proceedings and their consequences. The injury and damage so inflicted are estimated at not less than £500, in addition to the loss of said profit of £725."

The pursuer pleaded—"(1) The defender having dispossessed *brevi manu* the said Adam Borland & Co. of their property, and appropriated materials in their possession, having acted in violation of the agreement condescended on, and prevented them from fulfilling their obligations thereunder, the pursuer, as trustee foresaid, is entitled to decree as craved. (2) The defender is liable in damages and *solatium* as concluded for, in respect of (1) injury, (2) *damnum emergens*, and (3) *lucrum cessans*."

The defender pleaded—"(2) The defender having acted within his rights in the matter alleged, the action cannot be maintained. (3) *Separatim*, The defender having acted in the matter alleged with the consent and authority of the said firm, the action cannot be maintained. (4) No damage having been sustained, the defender should be assoilzied."

Proof was led. Robert Bryce, called for the pursuer, said—"I am a joiner. I was foreman joiner to Borland & Co. at the tenements in question. I have had considerable experience as a joiner. I was foreman with different parties in Partick and Govan for about six years. I went to Borland & Co.'s tenements at the beginning of the work. The buildings I had previously been engaged upon were of a better class than those of Borland & Co. The joists of the tenements in question were made of white pine. It was not first-class timber. Some of the joists were good, and some were not. I cannot say how many were not good—about six or seven. There were fourteen joists in each flat, and four flats in each tenement. Some of the joists were bridled, that is, joined. That must tend to weaken the building, because the full length of the joists ties the building together. I never saw joists bridled in other tenements. The joists were 36 feet long, and 10 inches by 2¼. (Q.) Did you consider they were sufficient to bear the weight and strain in that tenement?—(A.) Yes, but they did not bind the back and front walls together. *By the Court*—(Q.) And what would happen in consequence?—(A.) Perhaps the weight of the roof might strain the back or front wall, and it might go out, and then I suppose the building would shiver and come down. *Examination continued*—I saw no symptoms of strain. The first beams were put in about July. They were quite visible up to October. I saw Mr Thomson once or twice about the premises. I observed the couplings of the roof. (Q.) Were they well fastened together?—(A.) There was an oxter-piece at one and a baulk at another. *By the Court*—(Q.) Was that good work?—(A.) Well, no. There should have been an oxter-piece and a baulk at each coupling. *Examination continued*—It is not common to put them up at first at every alternate coupling and add the others afterwards. I never saw or heard of that." Three witnesses for the defender, —M'Laren, Fulton, and Love—all joiners, gave evidence as to the rough, faulty, and unsafe character of the work.

The Lord Ordinary (Rutherfurd Clark) assoilzied the defender. His Lordship added the following note:—"This is an action for damages. It is laid on the allegation that the defender illegally took possession of certain buildings which Borland & Co. were in the course of erecting, and thereby caused damage to that company. The circumstances are these—The firm of Borland & Co. was formed in the month of May 1880 for the purpose of a building speculation into which it had then entered. It consisted of three individuals, not possessed of much capital, for the assets of the firm at its commencement were estimated by one of the partners not to amount to more than £50, and I think it is somewhat doubtful if they reached that amount. The speculation into which they entered was a building speculation, and under it the company were to build on the defender's property three tenements of workmen's houses. There was an understanding, perhaps amounting to an obligation, on Mr Paterson's part, that he was to advance from time to time the necessary amount to enable the company to proceed with the work, and the expectation of the company of course was that they would make a profit by selling or letting the subjects on their completion, when they were entitled, on payment to the defender of the advances he had made, to a title from him.

"With reference to the advances of money, the written agreement contains no obligation of that kind on the part of the defender. But it is said there was a separate obligation which he undertook verbally, either at the time the written agreement was signed or shortly thereafter. If this amounted to an obligation at all, it was an obligation to which a condition was attached, and the condition was either that the work should be carried on by the company to the satisfaction of the defender's architect, or at all events that the work should be of a satisfactory nature.

"The works were proceeded with, and certain advances were made by the defender to account. It is proved, in my opinion, that after they had reached a certain stage, complaints, both written and verbal, were made by the defender; and it is equally certain that the architect, Mr Thomson, in July, or at all events certainly in the beginning of September, stated that he could not certify for any further advances in consequence of his belief that the works were in an unsatisfactory condition. Further, I think it proved, as matter of fact, that the works were not in a satisfactory condition; that they had not been carried on in the way which the defender was led to expect; and indeed that they were in such a condition that if completed in the manner proposed they would not have been fit or safe for human habitation.

"So matters stood on 13th October 1880. At that time it seems to me certain that the defender was not under any obligation to make further advances, because if he was under any obligation to make advances the condition on which it rested had not been fulfilled by the company. He resolved that he would not make further advances. That being so, the position of the company seems to be in no way doubtful. I think it was impossible, without the assistance of the defender, that they could have gone on for a single day. I do not speak merely of their want of means when they began, because these means had been consumed in the course of carrying out the speculation. They had no funds and no credit, and were under a considerable load of debt; consequently, I think the company could not go on unless Mr Paterson had been willing, which he was not, to continue the assistance he had theretofore afforded them. But I do not think this is a matter that depends on my opinion, because the company, or the leading partner of the company, admitted that it was as I have stated, and I think Mr Kennedy, their agent, made precisely the same admission. Given these two facts—that the defender refused to continue his advances, and that the company could not go on—what must be done? If the houses are not completed there is certainly a great loss for every day they stand uncompleted. If, on the other hand, the defender took on himself the risk of completing them, then the company would have the benefit of the speculation, for they would be entitled to demand a conveyance from the defender on paying the amount of his outlay. It seems to me that it was a most beneficial thing for the company, and the only chance which they had of making profit from their speculation, that the defender undertook to complete, and did complete, the buildings. If he had not, the loss must have been very great to the company. By going on with the buildings he gave the company the only possible chance of making a profit or of avoiding loss. That being so, I cannot conceive how the pursuer can succeed in getting damages, even if he assumed the defender took possession illegally. I am therefore of opinion that the defender is entitled to absolvitor, because the company were not injured, and could not be injured, by anything which Mr Paterson did. On the contrary, what he did was, I think, the best and wisest course to follow for the interests of all parties concerned. But further, I am of opinion that in October 1880 the company were of this mind:—They did not seek to maintain themselves in the possession of the buildings, and they manifested no desire to carry on the works. I think they were glad to get the assistance which the defender gave them in an indirect way, and consequently they never, in any sense of the word, made any remonstrance against Mr Paterson's act, or vindicated any desire to carry on the buildings themselves, as they now say they desired to do."

The pursuer reclaimed, and argued—The defender had acted in an illegal manner, and in contravention of the terms of the agreement. Even if the pursuer could instruct no specific damage, he was entitled to a sum of nominal damages in respect of the defenders' breach of contract—*Webster* v. *Cramond Iron Company*, June 4, 1876, 2 R. 752.

The defender replied—His conduct throughout had been legal, and was fully justified in the circumstances. The pursuer had suffered no damage.

At advising—

Lord President—I think the Lord Ordinary's judgment is sound. The work was going on from the summer to September 1880, and nothing occurred to cause disputes or want of concord between the pursuers, who had entered into a risky speculation without much capital, and Mr Paterson, on whose ground they were building. Mr Thomson granted three certificates for instalments, in which he said the work was going on properly, but on 6th September 1880 he stated that the work was so bad that he could not report further for payment. So that the work was all right down to the 8th of July 1880, but the work done between that and September following would not pass. What was wrong with it we learn very clearly from the evidence of M'Laren, Fulton, and Love, who are witnesses for the defender, and of Robert Bryce, who was foreman joiner for Messrs Borland, whose evidence I see no reason to reject, though it was probably not what the pursuers had expected it to be. I need not examine in detail what is said by the defender's witnesses, who point out in very clear terms the specific defects in these buildings, some of which they state to be of such a kind as to require immediate attention and alteration in order to avert danger. That being so, what was it that the defender did when these facts came to his knowledge? We have his own testimony, and we have the correspondence, which is perhaps the best and most reliable evidence, having been written at the time.

In his letter of 27th September 1880, which is a very reasonable one, and not written in any hostile tone, he says he is surprised the defects have not yet been put to rights, and suggests that the pursuers should do this themselves, and so put him in a position to continue his money payments

to them. Mr Coupar admits that letter to have been received by his firm, but no answer was made to it. More than a fortnight elapsed, and nothing was done after the complaint had been formally made by Mr Paterson. That state of things could not be allowed to continue, so Paterson went with his people to the place for the purpose of seeing what ought to be done. What was said thereafter is of no great moment. Probably foolish things were said on both sides, and both parties became heated and inclined to be unreasonable. But let us see what was actually done. Mr Paterson writes his letter of 13th October, which is a very important one. It is clear from that letter that his act of taking possession of the premises on 13th October was not for the purpose of taking the work off the hands of the pursuers, but for the limited purpose of remedying the existing defects in the buildings. On 18th October a further visitation took place, and again there are doubts thrown on what was said by the parties at that time. But we have again a distinct record of what was done in the letter of Mr Paterson's agent on 20th October. He says the imperfect and dangerous work has now been put all right, but explains that unless Messrs Borland will proceed with the buildings, resuming their work in the course of a week, it would be necessary for the defender to finish them himself, and sell them in terms of the agreement. To this letter no answer was made. There was no intimation by the pursuers, or any one of them, that they were willing to go on and finish the work. They had had several intimations that they should be going on with it, as winter was approaching, and it was necessary to get the houses roofed in. Then on 26th October Mr Paterson's agent again writes a very reasonable and proper letter. After that some further letters pass, and on November 1st he writes to Mr Kennedy, as agent for the pursuers and their creditors, in these terms:—"Dear Sir,—I beg to intimate to you, as acting for Messrs Adam Borland & Coy. and their creditors, that Mr T. L. Paterson will forthwith, in consequence of their leaving the tenements at Govan unfinished, and in terms of the agreement, proceed to finish the same, and sell and dispose thereof when finished, and apply the price or prices obtained therefor in repayment of his advances made and to be made, interest thereof, and all costs, charges, and expenses incurred and to be incurred in the premises, and he will account for the surplus, if any, to the person or persons having right thereto. I shall feel obliged by your acknowledging receipt of this intimation." Then Mr Paterson goes on with the work. Now, is he not justified in so doing by the terms of the agreement, for here he must rely on its terms? Before, when he was merely remedying existing defects, he was only acting the part of a prudent man, and his conduct could inflict no damage whatever upon the pursuers, but now, on the other hand, he does propose to end the job altogether, and must act under the terms of his agreement. The pursuers had not answered his letters, and I think in these circumstances Mr Paterson was entitled to assume that they had abandoned the work, and that he was, under the terms of the agreement, entitled to go in and finish it himself. The agreement provided—"*Third*—The second parties shall before the term of Whitsunday 1881 erect and finish on said plot of ground tenements of dwelling-houses, or of shops and dwelling-houses, of four square storeys in height, with suitable offices, and the houses shall consist of not less than two apartments each, but the second parties shall have liberty to have one house of one apartment in each flat. . . . *Eighth*—The first party shall also have full power, if he thinks proper, to complete and finish any of said tenements left unfinished, at the sight of any architect in Glasgow whom he may appoint previous to selling and disposing of the same, and a certificate under the hands of said architect of the sums which may be expended by the first party in completing and finishing said tenements, including said architect's remuneration, shall be sufficient evidence of the sums of money that may be so expended." It was argued for the pursuers that the import of these clauses is, that if the pursuers fail to finish the work by Whitsunday 1881 the defender will be entitled thereafter to go in and finish it. I think that is part of their import; if the buildings were unfinished at Whitsunday 1881 Mr Paterson would no doubt be entitled to take possession, but there is also another view in which he is entitled to do so. I think after the intimation of 1st November it would be unreasonable to hold that he must wait till Whitsunday 1881 before entering into possession of the tenements, which the tenants by their conduct had shown their intention of leaving unfinished. Mr Paterson's actings were, in my opinion, justified by the emergency of the case, and after the intimation of the 1st November I think he had quite a right to act as he did. I am therefore for adhering.

Lords Mure and Shand concurred.

Lord Deas was absent.

The Lords adhered.

Counsel for Pursuers (Reclaimers)—Mackintosh—M'Kechnie. Agent—John Macpherson, W.S.

Counsel for Defender (Respondent)—Trayner—Guthrie. Agents—Macandrew & Wright, W.S.

Wednesday, December 21.

FIRST DIVISION.

[Lord Adam, Ordinary.

SCHOOL BOARD OF HARRIS *v.* MACKAY AND OTHERS.

Process—Reclaiming Note—Multiplepoinding—Competency.

Held, following *North British Railway* v. *Gledden and Others*, June 26, 1872, 10 Macph. 870, that a reclaiming note against a Lord Ordinary's interlocutor which repelled objections to and approved of a condescendence of the fund *in medio*, and found the objectors liable in expenses, is competently presented without leave of the Lord Ordinary, and within twenty-one days of the date of the interlocutor.

Counsel for Reclaimer—Jameson. Agents—J. & J. Ross, W.S.